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Supreme Court of the United States

October Term, 1947.

No. 139.

JOSEPH ESTIN,

Petitioner,

vs.

GERTRUDE ESTIN,

Respondent.

PETITIONER'S REPLY BRIEF.

GEORGE S. WING,
JAMES G. PURDY,
ABRAHAM J. NYDICK,
Counsel for Petitioner.

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JOSEPH ESTIN, *Petitioner,* vs. GERTRUDE ESTIN, *Respondent.*	No. 139.

PETITIONER'S REPLY BRIEF.

Respondent has filed a verbose brief of 24 pages, in an attempt to convince this Court that no issue is presented by the record requiring consideration by this Court.

A careful study of that brief indicates that respondent relies on two alleged propositions of law:

1. That *Barber* v. *Barber*, 21 How. (62 U. S.) 582, is controlling; and

2. That Mr. and Mrs. Estin had entered into a separation agreement, the provisions of which, so far as alimony is involved, were made a part of the separation decree, and hence, under New York Law, is not affected by the divorce decree entered in Nevada; also——

3. That respondent has misinterpreted many decisions of this Court.

1.

Respondent ignores the effect of this Court's decision in *Esenwein* v. *Commonwealth of Pennsylvania*, 325 U. S.

279, and relies on the old case of *Barber* v. *Barber, supra*, as did the Court of Appeals, in its opinion, in this case.

Barber v. *Barber*, 62 U. S. (21 How.) 589, was quoted in *Haddock* v. *Haddock*, 201 U. S. at 571, as an authority for the decision there made, as follows:

> "But if the husband, as is the fact in this case, abandons their domicile and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries or the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicile hers" (p. 589).

Hence it is clear that a basic principle upon which *Barber* v. *Barber* was decided was considered by this Court in *Haddock* v. *Haddock* to be an authority and precedent upon which the latter was decided, a principle expressly overruled in *Williams* v. *North Carolina*, 317 U. S. 287.

In the opinion in the *Barber* case, the Court says (p. 589):

> "the defendant had made his application to the Court in Wisconsin for a divorce *a vinculo* from Mrs. Barber, without having disclosed to that Court any of the circumstances of the divorce case in New York; [illegible] that, contrary to the truth, verified by that record, he asks for the divorce on account of his wife having willfully abandoned him;" (and at p. 584),
>
> "The Court in Wisconsin was asked to prevent that decree from being defeated by fraud."

Of course, the Wisconsin divorce action was clearly a fraud upon both the Wisconsin Court and on Mrs. Barber.

If this Court when it decided the *Barber* case in 1859 thought it was applying the New York law as to the effect of a divorce decree upon the alimony provisions of a prior separation decree, it neither said so nor cited any New York cases. If the New York Court of Appeals assumed that this Court was so applying New York law, it also cited no New York cases in support of that assumption.

Until the decision of this Court in *Williams* v. *North Carolina*, 317 U. S. 287, divorces like that obtained by Mr. Barber in Wisconsin were held null and void in New York State and in other states.

Only this Court can clarify the situation arising out of the old *Barber* decision and the more recent *Williams* and *Esenwein* decisions, in view of the reliance made by the Court of Appeals upon the *Barber* case in its opinion in the instant case.

2.

The respondent repeatedly refers to the stipulations (Plaintiff's Exhibit B, B1), (R. 23, 29) as an agreement for the payment of alimony. The instruments state them to be stipulations and the provisions thereof to be "subject to the approval of the Court" (R. 24, 25).

The opinion of the Court of Appeals, in referring to the amount of the suggested payments, describe it as "an amount that had been recommended in a stipulation filed with the Court". The Special Term was not bound to accept the recommended amount and to include same in the decree. It could, in its discretion, fix either a greater, lesser or no amount at all. Until Mr. Estin had obtained his divorce, the Special Term of the New York Supreme Court had full power to modify the alimony provisions of the decree by increasing, reducing or eliminating the same entirely.

No enforceable right vested in the plaintiff by virtue of this stipulation, as same, in no sense did constitute a contract between the parties. By its terms, the stipu-

lation left to the Court's discretion to determine the amount, if any, to be paid. It was in fact, as the Court of Appeals stated, merely a recommended amount to be awarded if the court approved.

The cases cited on page 22 are not in point. In these cases, to wit:

Schneitzer v. *Buerger,*
Hamlin v. *Hamlin,*
Braunsworth v. *Braunsworth,*
Goldman v. *Goldman,*

there were pre-existing and enforceable agreements made between the parties independently of and apart from the separation action. These agreements were such that they might have been enforced in accordance with their terms independently of any separation action or decree therein. Such was not the fact in the present case.

The respondent's contention that she was entitled to collect her alimony from the petitioner as a contract right based upon this stipulation is without merit,

3.

In respondent's "Argument" on page 3, counsel says that this Court has many times answered in the negative the first question quoted thereon.

Counsel is obviously in error in this statement. Not only do the cases cited on page 4 consider facts entirely different from those in the case at bar, but this Court in *Esenwein* v. *Commonwealth of Pennsylvania,* 325 U. S. 279, has held to the contrary.

There is a vast difference between rights flowing from contracts, deeds, etc., and rights which are merely an incident to a marital relationship, and which cannot arise or exist except through that relationship in the absence of special statutes (see cases cited on p. 8 of our main brief).

Respondent's entire argument on pages 4, 5, and 6 merely emphasizes that there is a real question here presented requiring consideration by this Court.

On pages 12 and 13 respondent cites cases to the effect that in New York the law respecting Divorce and Separation are statutory. *Romaine* and *Eckenbrach* cases cited by us on page 6 of our brief are the leading cases.

Respondent on her brief cites numerous cases which it is stated cite and follow the decision of this Court in the old *Barber* case.

Many of the cases cited by respondent as approving or following the *Barber* case are entirely out of order. Some we have considered. The others either consider facts wholly dissimilar to those in the instant case or do not purport to cite or follow the *Barber* case.

Harding v. *Harding*, 198 U. S. 317, at 339, discussed the *Barber* case, and said "It (in the *Barber* case) was considered that the judgment in New York, legalizing the separation precluded the possibility that the same separation could constitute willful desertion of the wife by the husband". In support of this statement this Court used the quotation from the *Barber* case as printed on page 2 of this brief.

Of the remainder of the cases said by respondent to cite and follow the *Barber* case, none present facts in any way similar to the facts in the instant case, and in several the *Barber* case is not even mentioned.

Lynde v. *Lynde*, 181 U. S. 186, considered a judgment granted by a New York Court for arrears of alimony due under a New Jersey divorce decree. No other divorce was involved. Typical of the respondent's mistakes in analyzing cases is the citation of *Durlacher* v. *Durlacher*, 123 Fed. 2d 70, and *Bassett* v. *Bassett*, 141 Fed. 2d 954, on pages 8 and 9, as authorities sustaining the decisions of the New York Courts in the case at bar. They relate to matters of practice only so far as they are here applicable. Any error of the New York Courts in granting

the money judgments for arrears of alimony could be considered only by an appeal to and through the New York Courts and to this Court. In each case the ex-wife obtained a money judgment in New York for arrears of alimony under a New York separation decree as did Mrs. Estin here. Instead of pursuing an appeal through the New York Courts as we did in the instant case, and then to this Court, both Mr. Durlacher and Mr. Bassett who had obtained divorces in Nevada sat still until suits were begun in the United States District Court in Nevada upon the money judgments obtained in New York. Those courts correctly held that, as the New York Courts had jurisdiction to grant the judgments, the U. S. Courts were obliged to enforce them. The Circuit Court of Appeals in the *Bassett* case pointed out that the fatal defect of that defendant was in not pursuing the practice that we have followed here (p. 955, quoted by respondent on page 11).

On page 15 respondent cites *Waddey* v. *Waddey*, 290 N. Y. 251 (there incorrectly cited) as later authority than *Karlin* v. *Karlin*, 280 N. Y. 32, cited on page 7 of our brief. The *Waddey* case simply held that the legislature was without power to authorize the Courts to amend the alimony provisions of a decree in existence when the amendment to the statute was enacted. We have no similar situation here.

In the recent case of *Security Trust Co. of Rochester* v. *Woodward*, cited on page 18, it is evident that the Circuit Court of Appeals felt obliged to follow the decision of the New York Court of Appeals in this case. Presumably an application to this Court for a Writ of Certiorari has or will be made in that case.

Magnolia Petroleum Co. v. *Hunt*, 320 U. S. 430, has no facts in common with the instant case.

On page 18 respondent cites cases from nine states as authorities supporting the decision of the New York Court of Appeals in the instant case.

Our examination of these cases is interesting. Only two or three consider facts at all similar to the one at bar and they were decided before this Court decided the *Esenwein* case or did not cite it.

Price v. *Ruggles*, 247 Wis. 187 (1943) discussed rights of two women to dower rights, one of whom had been divorced.

Simonton v. *Simonton*, 40 Idaho 751 (1925) in a 3 to 2 decision held that the support provisions of a separation decree remained in full force until a motion has been made to modify the decree based upon a subsequent divorce obtained by the husband out of the state upon constructive service. Two justices dissented upon the ground that the divorce was an absolute bar to a claim for support under the pre-existing separation decree.

Van Inwagen v. *Van Inwagen*, 86 Mich. 33 (1921) considered a divorce in another state obtained against a Michigan resident, and a Michigan Statute which permitted the resident of that state to sue for a divorce upon that ground.

Bennett v. *Bennett*, 63 N. J. Eq. 306;
Bolton v. *Bolton*, 86 N. J. L. 622;
Arrington v. *Arrington*, 127 N. C. 190, and
Rogers v. *Rogers*, 46 Ind. App. 509

were cases where suit had been brought for alimony awarded by decrees in other states.

Chappell v. *Chappell*, 86 Md. 532, considered solely several orders made in that case and no divorce decree of another state was involved.

State cases to the contrary and upholding our position, in addition to the Pennsylvania Supreme Court decision in the *Esenwein* case, include *Harrison* v. *Harrison*, 20 Ala. 679, and *McCullough* v. *McCullough*, 203 Mich. 288.

The views there expressed on the question of law presented by this application for a writ are not without support from some of our New York Supreme Court Justices.

In *Kreiger v. Kreiger*, 271 N. Y. App. Div. 872 (1st Dept.) a case similar in facts to the one at bar, two of the Justices voted to reverse a money judgment for arrears of alimony claimed to be due the plaintiff. Mr. Justice Callahan said:

> "If the Nevada divorce was valid it terminated the marital relation and the wife's rights under the separation decree (citing cases)."

Respondent, on page 23 of her brief, takes issue with the petitioner's statement in his brief (p. 6) that the only statutory provisions in New York providing for support for an ex-wife are contained in Section 1155 of the Civil Practice Act and Section 7, Part 5 of the Domestic Relations Law. Respondent is correct in her statement that there is an additional statutory provision, Section 1140 A of the Civil Practice Act, which, however, relates solely to cases of annulment of a void or voidable marriage. With that correction, our statement in Paragraph 4 (not 5 as respondent says) on page 6 of our brief is an accurate statement of the New York law, and respondent's comment respecting Sections 1161-1164 is incorrect. Those sections refer to decrees in separation actions, and not to divorce actions.

IN CONCLUSION.

Writ of Certiorari Prayed for Should Be Granted.

Respectfully submitted,

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